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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,610	12/02/2003	Kenneth A. Martin	1190.10	4996

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EXAMINER

LEITH, PATRICIA A

ART UNIT PAPER NUMBER

1655

DATE MAILED: 11/29/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/725,610

Applicant(s)

MARTIN ET AL.

Examiner

Patricia Leith

Art Unit

1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 13 September 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) 19 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1, 2, 9-12, 15-16 and 18 is/are allowed.
- 6) ☒ Claim(s) 3-8, 13, 14, 17, 21-27, 31, 32 and 37 is/are rejected.
- 7) ☒ Claim(s) 20, 28-30 and 33-36 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Claims 1-37 are pending in the application.

Claim 19 was withdrawn from consideration on the merits as it is directed toward a non-elected invention in the election made on 5/19/05 (It is noted that the Examiner inadvertently failed to state this in the previous office action).

Claims 1-18 and 20-37 were examined on their merits.

The previous rejections are hereby removed due to Applicant's amendment to claims 1 and 20 which state 'consists of' and 'consisting of' respectively which excludes material other than that explicitly claimed.

### ***Terminal Disclaimer***

The terminal disclaimer filed on 9/1/06 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of US 6,900,173 has been reviewed and is accepted. The terminal disclaimer has been recorded.

### ***Claim Objections***

Claim 20 is objected to because of the following informalities:

Claim 20 recites 'wherein the protein additive consisting of'. This appears to be a minor grammatical error, wherein the statement should properly read: 'wherein the protein additive consists of'. Claims 28-30 and 33-36 are objected to for depending upon claim 20.

Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 3-8, 13, 14, 17, 21, 22, 23, 24, 25, 26, 27, 31, 32 and 37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 3, 4, 5, 6, 7 and 8 all recite 'further comprising'. Thus, these claims attempt to incorporate additional matter into claim 1. Because claim 1 states 'consists of', and because 'consists of' is closed language, not allowing the incorporation of any other ingredients, these claims are deemed ambiguous; how can these claims be incorporated into claim 1 when claim 1 is closed to additional ingredients? A suggestion to overcome this rejection is to cancel these claims and submit a new independent claim which adds these ingredients.

Similarly, claims 21, 22, 23, 24, 25, 26, 27 all recite 'further comprising'. Thus, these claims attempt to incorporate additional matter into claim 20. Because claim 1 states 'consists of', and because 'consists of' is closed language, not allowing the incorporation of any other ingredients, these claims are deemed ambiguous; how can these claims be incorporated into claim 1 when claim 1 is closed to additional ingredients? A suggestion to overcome this rejection is to cancel these claims and submit a new independent claim which adds these ingredients.

Claims 13 and 14 are indefinite in that they lack antecedent basis with claim 1. Claim 1 limits the composition to comprising a fiber selected from quinoa, millet, spelt, buckwheat, kamut, corn, rice, wheat, barley, oats, amaranth, wheat, bulgar and rye. Correction is necessary.

Claim 17 recites 'and combinations thereof' which lacks antecedent basis in claim 1 because claim 1 limits the composition to exclusively containing the ingredients of part (g). Further, this claim is redundant in that most of the constituents were already recited in claim 1. A suggestion to overcome this rejection is to insert 'and combinations thereof' at the end of claim 1, part (g).

Claim 31 recites 'and combinations thereof' which lacks antecedent basis in claim 20.

Claim 32 recites 'wherein the fiber is a grain or a flax seed'. This statement lacks antecedent basis in claim 20 because claim 20 limits the fiber to one of quinoa, millet, spelt, buckwheat, kamut, corn, rice, wheat, barley, oats, amaranth, wheat, bulgar and rye

Claim 37 states 'and combinations thereof'. This statement lacks antecedent basis in claim 20 because claim 20 states 'an amino acid' and also states 'consisting of' which does not allow for the inclusion of additional ingredients.

Claims 1, 2, 9-12, 15-16 and 18 are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia Leith whose telephone number is (571) 272-0968. The examiner can normally be reached on Monday - Friday 8:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Patricia Leith  
Primary Examiner  
Art Unit 1655

A handwritten signature in black ink, appearing to read 'Patricia Leith', with a large, stylized initial 'P' and a long, sweeping underline.

November 22, 2006